

DECISION



12740 J. Cohen
Trans
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-196615

DATE: February 5, 1980

MATTER OF: Sylvester James & Sons Maintenance Service, Inc.

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DIGEST:

1. Protest by incumbent contractor that because of certain administrative problems in its contract it effectively was precluded from competing for subsequent contract for same services is denied, since firm submitted proposal under new RFP and award was made to lower-priced offeror consistent with RFP's terms.
2. In negotiated procurement, contracting officials are precluded from opening proposals in public.
3. Mere speculation that price information improperly was disclosed in negotiated procurement does not meet protester's burden to affirmatively prove its case.
4. Possibility of buy-in does not provide basis to challenge award of contract to responsible firm. Moreover, GAO does not review protests against affirmative determinations of responsibility except in circumstances not applicable here.

Sylvester James & Sons Maintenance Service, Inc. (James) protests the award of a contract by the Department of the Navy to Hamilton Enterprises, Inc. (Hamilton) for mess attendant services under request for proposals (RFP) No. N00123-79-R-1440. James, the incumbent contractor, alleges that because of certain problems in the administration of

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[Incumbent Contractor Protests Award]

its contract it effectively was deprived by the Navy of the opportunity to compete under the RFP. James further protests that "bids were opened in secret;" that after its initial prices were submitted they improperly may have been disclosed only to Hamilton; and that Hamilton cannot perform adequately at the contract price.

The protest is denied in part and dismissed in part.

The RFP contemplated an incentive-type contract. It prescribed the hourly rate that would be paid to mess attendants, as well as a maximum number of mess attendant manhours and a maximum incentive award amount authorized. Offerors were to enter on the Schedule only a price for "Management and Support," described as including direct management costs for an on-site manager and mess attendant supervisors, overhead and support costs (uniforms, insurance, travel expenses, etc.) and "Contingency/profit" (the "contingency" was defined to include any variations in direct labor cost from that reimbursed through the prescribed manhour rate, such as overtime expenses and shift premiums). Award was to be made to the offeror submitting the lowest Management and Support price. The amount finally payable would be the hourly rate multiplied by the actual number of manhours furnished, plus the award amount earned and the fixed Management and Support price.

The Navy received three offers, including one from James. Best and final offers subsequently were submitted, and Hamilton's Management and Support price of \$54,725 was the lowest of those, the others being \$65,000, and \$141,787.44 by James. Accordingly, a contract under the RFP was awarded to Hamilton.

Concerning the effect of James' past performance on the ability to compete on the instant procurement, we note that the firm did submit a proposal, and James does not contend that its relatively high offer was related to or occasioned by any earlier contractual

problems. Accordingly, and since award was made to Hamilton consistent with the terms of the RFP, the protest on this issue is denied.

James' protest that "bids were opened in secret" evidences a misunderstanding of the procedures used in a negotiated procurement. While in a formally advertised procurement "bids" are publicly opened and award made to the low responsive responsible bidder, Defense Acquisition Regulation (DAR) § 2-402 and § 2-407.1 (1976 ed.), in a negotiated procurement such as this one, contracting officials are precluded from opening proposals in public and thereby disclosing offerors' prices. DAR § 3-805.3.

Regarding James' third allegation, the Navy denies that any price information improperly was disclosed to Hamilton, and James has not proffered any evidence in support of its allegation. The protester has the burden to affirmatively prove its case, John Wile Construction Company, Inc., B-195717, November 16, 1979, 79-2 CPD 358, and mere speculation on an issue does not meet that burden. Colonial Ford Truck Sales, Inc., B-194047, June 27, 1979, 79-1 CPD 458. Accordingly, this portion of the protest also is denied.

James' only support for the contention that Hamilton submitted a below-cost offer is the substantial difference in the firms' Management and Support prices; James suggests that Hamilton's low price is premised on the expectation of "liberal consideration [by the contracting officer] of applications for changes," the receipt of future contracts for the services under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a)(1) (1976), and similar considerations.

We first note that in view of the second low offer of \$65,000, it appears that James' offer of \$141,787.44 may have been unreasonably high or may have represented a misunderstanding of the contract requirements, rather than that Hamilton's offer of

\$54,725 was an attempt at buying-in. In this regard, the Navy states that it performed a price analysis on all offers received and that its conclusion was not that Hamilton's offer was too low, but that the protester's was too high.

In any event, even if James' allegation that Hamilton submitted a below-cost offer is correct, there is no legal prohibition against the acceptance of such an offer from a responsible firm. Cacciamani Brothers, B-194066.2, September 12, 1979, 79-2 CPD 189 (the award to Hamilton necessarily involved an affirmative determination of responsibility, DAR § 1-902). Rather, DAR § 1-311 cautions that where a buy-in is suspected, a contracting officer should assure that amounts excluded from the contract price are not recouped through change orders or follow-on contracts, which are substantially James' concerns. Thus, and since our Office does not review affirmative determinations of responsibility except in circumstances not applicable here, The Charles Lowe Company, representing Tecnaval S.R.L., B-194922, B-194922.2, July 30, 1979, 79-2 CPD 63, this allegation is dismissed.

We point out that whether Hamilton in fact fulfills its obligations at the contract price is a matter of contract administration, which also is not for our consideration. Industrial Maintenance Services, Inc., B-195216, June 29, 1979, 79-1 CPD 476.



For The Comptroller General
of the United States